

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-6034

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-6034

In the Matter of WEIS SECURITIES, INC.,

Debtor.

CLAIMS OF GEORGE ALDRICH, H. WALLACE COHU,
JOHN DE BRAGANCA, JAMES J. HIGGINSON, GRACE
CUTTING McGRATH, GRACE M. McGRATH, CRAIG K.
MITCHELL, EUGENE W. STETSON, JR., JEAN M.
WINSLOW, SAMUEL WINSLOW, ESTATE OF PHILLIP D.
HOLDEN, deceased, FIDELITY CORP., CHEMICAL
BANK, GENERAL UNITED LIFE INSURANCE CO., ALL
AMERICAN LIFE & CASUALTY CO., ROBERT SLATER,
EVA GROSSMAN, ARTHUR KREIZEL, and WEIS VOISIN
& CO., INC. EMPLOYEES' PROFIT-SHARING PLAN
AND TRUST,

Claimants-Appellants,

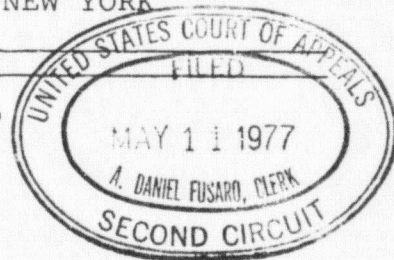
v.

EDWARD S. REDINGTON, Trustee, and SECURITIES
INVESTOR PROTECTION CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR CLAIMANT-APPELLANT
WEIS, VOISIN & CO., INC.
EMPLOYEES' PROFIT-SHARING
PLAN AND TRUST



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-6044

In the Matter of WEIS SECURITIES, INC.,

Debtor.

WEIS, VOISIN & CO., INC. EMPLOYEES' PROFIT-SHARING PLAN AND
TRUST,

Claimant-Appellant,

v.

EDWARD S. REDINGTON, Trustee, and
SECURITIES INVESTOR PROTECTION CORPORATION,

Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR CLAIMANT-APPELLANT
WEIS, VOISIN & CO., INC.
EMPLOYEES' PROFIT-SHARING
PLAN AND TRUST

PRELIMINARY STATEMENT

Claimant-appellant Weis, Voisin & Co., Inc. Employees' Profit-Sharing Plan and Trust (the "Employees' Trust") files this independent brief in support of the appeal from the order issued by the Honorable Inzer B. Wyatt, District Judge, because there are sufficient reasons to

warrant reversal of said order and remand of this case to the Bankruptcy Court as to the claim of the Employees' Trust regardless of the outcome of the appeal as to any other creditor's claim.* The classification of the claim of the Employees' Trust, which Edward S. Redington, the Trustee in liquidation of Weis Securities, Inc. ("Weis"), has allowed in full, will determine whether any amount will be collected thereunder for distribution to 334 former Weis employees.

STATEMENT OF ADDITIONAL
ISSUE PRESENTED FOR REVIEW

Can the Employees' Trust rescind the fraudulently induced subordinated agreement regardless of the outcome of the appeal as to any other creditors because the former employees of Weis, who are the real parties in interest, are entitled to greater equity in this liquidation?

STATEMENT OF FACTS

The Employees' Trust is the tax-qualified retirement plan which provided part of the compensation (paid by

* Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the Employees' Trust adopts by reference the Joint Brief for Appellants filed in this appeal by other creditors. We trust that the Court will be ably advised by counsel for the other creditors of the support for the argument that, as a general rule, subordination agreements induced by false and fraudulent representations may be rescinded and, accordingly, this brief will not repeat such arguments. The Employees' Trust also relies on the letter to Judge Babitt dated January 14, 1975 from the Securities and Exchange Commission to the extent that it supports rescission. (App. 306)

Weis in the form of contributions) for eligible Weis employees, substantially all of whom were dismissed by the Trustee upon acceptance of his appointment and many of whom, we understand, have been unable to find suitable employment. On May 30, 1973, there were 334 such employees. As a result of the Weis liquidation proceeding, the Employees' Trust must be terminated, and each such employee must receive a distribution of his interest in the assets thereof (the principal remaining assets of the Trust being the subject of the claim since substantially all of the other assets of the Employees' Trust have been distributed to employees with the approval of the Internal Revenue Service). (App. 192)

Weis owes the Employees' Trust the sum of \$95,000 in principal amount plus accrued interest at the rate of 9% per annum pursuant to a Cash Subordination Agreement dated November 30, 1972. (App. 195) For purposes of this appeal, the Trustee has taken the position that this loan was obtained and continued in reliance upon false and fraudulent representations of the financial condition of Weis. (App. 251)

ARGUMENT

WEIS EMPLOYEES SHOULD NOT BE DEPRIVED OF THE EARNED BUT UNPAID COMPENSATION OWING TO THEM THROUGH THE EMPLOYEES' TRUST

The real parties in interest here are former employees of Weis. The claim for cash loaned to Weis represents in substance unpaid compensation owing, through the Employees' Trust, to eligible former employees. Each elig-

ible former employee must receive a distribution of his interest in any amount recovered by the Employees' Trust.

Bankruptcy courts have been particularly inclined to protect the rights of employees under a retirement plan which had been maintained by their employer. See, e.g., In re Penn Central Transp. Co., 484 F.2d 1300 (3d Cir. 1973), aff'g, 354 F. Supp. 408 (E.D.Pa. 1973), cert. denied, 415 U.S. 951 (1974); In re W. T. Grant Company: Order Authorizing and Approving Compromise and Settlement of the Claim of the Employees' Retirement Plan of W. T. Grant Company, 75 B 1735 (S.D.N.Y. July 14, 1976).*

Bankruptcy courts must determine the status of each claim on the basis of the equities where fraud has been charged by putatively subordinated lenders. In re Credit Indus. Corp., 366 F.2d 402, 409-11 (2d Cir. 1966); In re Joe Newcomer Finance Co., 226 F.Supp. 387, 390-92 (D.Colo. 1964); and see Oppenheimer v. Harriman Nat'l Bank and Trust Co., 301 U.S. 206, 213-15 (1937); Pepper v. Litton, 308 U.S. 295, 304-05, 307-08 (1939); Kothe v. R.C. Taylor Trust, 280 U.S. 224, 227 (1930).

* The Penn Central case, although technically distinguishable as a railroad reorganization, evidences that the long-standing policy favoring displaced employees extends to claims for unpaid contributions to retirement plans. In addition, the Employees' Retirement Plan of W. T. Grant Company was paid before all other priority claims although Grant, like Weis, was being liquidated rather than reorganized.

In this regard, reversal of the District Court's order would give proper accord to the long-standing statutory and judicial policy favoring employees displaced by a liquidation in order to alleviate to some degree the hardship of sudden and unexpected unemployment. See Joint Indus. Bd. v. United States, 391 U.S. 224, 226-28 (1968); United States v. Embassy Restaurant, Inc., 359 U.S. 29, 31-32 (1959)*; 11 U.S.C. § 104(a)(2). Even actual reliance by general creditors, in extending credit to an employer, upon assets purportedly set aside for employees under a retirement plan

* Embassy Restaurant did not, as Counsel for the Trustee argued below, involve a tax-qualified retirement plan such as the Employees' Trust. On the contrary, that case, like Joint Industrial Board, involved a union welfare plan under which the bankrupt's employees had no right to any payments, including any contributions which might have been recovered from the bankrupt estate. The union welfare plans were not required to distribute their assets upon the insolvency of the employers, and the union plan administrators would have had complete discretion to withhold any payments from the bankrupts' employees if any contributions had been recovered in those cases. It was for that express reason, which distinguishes the present case, that the Supreme Court determined that priority treatment in those cases would not "satisfy the purpose for which Congress established the priority." 359 U.S. at 33; see also 391 U.S. at 227-28. In stark contrast, the Employees' Trust must be terminated, and each employee must receive a distribution of his interest therein which amounts to unpaid compensation from Weis. The Supreme Court in Embassy Restaurant expressly recognized and approved the long-standing bankruptcy policy favoring discharged employees in appropriate situations. 359 U.S. at 33.

is "not necessarily controlling." In re Penn Central Transp. Co., supra, 354 F. Supp. at 413.*

For example, the Bankruptcy Court (Judge John L. Galgay presiding) recently approved a settlement of a claim for unpaid contributions due to the Employees' Retirement Plan of W. T. Grant Company, pursuant to which the bankrupt estate was required to pay over \$1.5 million to the plan for ultimate distribution to the bankrupt's former employees despite express language in the plan document that all employer contributions were voluntary. That claim was paid even before claims of the Internal Revenue Service and senior secured creditors because of the compelling equities favoring claims for unpaid contributions to retirement plans brought on behalf of a bankrupt's former employees. In re W. T. Grant Company, supra. See In re W. T. Grant, Bankrupt: Unpaid Employer's Contributions to an Employee Plan, Executive Compensation Journal, Jan. 1977 at 3.

Reversal would also be consistent with the Congressional intent, enunciated in section 2 of the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829 (1974), of protecting the interests

* As concerns the claims of customers, it has been widely reported that "special arrangements" were made for certain large customers of Weis. As concerns general creditors, the Trustee's position with respect to the net capital rules is ill-founded. See Blaise D'Antoni & Assoc., Inc. v. SEC, 289 F.2d 276, 277 (5th Cir.), cert. denied, 368 U.S. 899 (1961).

of employees under tax-qualified retirement plans such as the Employees' Trust and providing appropriate remedies in the Federal courts. If the holding in Embassy Restaurant were applicable at all to this case, it would have to be applied consistently with this Congressional intent.

It should be remembered that, although the morale of the employees of Weis was irreparably damaged when the Trustee dismissed them, their claims (like those of the Penn Central employees who had already retired) deserve some consideration because their " . . . past services helped to create and preserve the estate of the Debtor. . ." In re Penn Central Transp. Co., supra, 354 F.Supp. at 411. These loyal employees would be effectively deprived of a substantial portion of the assets held under their tax-qualified retirement plan, representing earned but unpaid compensation, if the fraudulent subordination provisions were enforced against them. As discussed above, this would be inconsistent with ERISA and the cases arising since its enactment.

CONCLUSION

For the reasons stated above, we respectfully request that in regard to the claim of the Employees' Trust, the order of the District Court be reversed and this case be

remanded to the Bankruptcy Court for further proceedings
consistent with its opinion of July 15, 1976.

Dated: New York, New York
May 9, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter :
of : AFFIDAVIT OF SERVICE
WEIS SECURITIES, INC., :
Debtor. :

CLAIM OF WEIS VOISIN & CO., INC. :
EMPLOYEES' PROFIT-SHARING PLAN AND :
TRUST :

- - - - - X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Mirelda Waldron, being duly sworn, deposes and
says:

That deponent is not a party to this action, is
over 18 years of age and resides at 1417 President Street,
Brooklyn, New York.

That on the 9th day of May, 1977, deponent served
the brief of Claimant-Appellant Weis, Voisin & Co., Inc.
Employees' Profit-Sharing Plan and Trust in the above cap-
tioned action in the form annexed hereto by depositing true
copies of the same securely enclosed in post-paid wrappers
in an official depository under the exclusive care and
custody of, and regularly maintained by, the United States
Postal Service at 30 Rockefeller Plaza, in the Borough of
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Mildred Walden

Sworn to before me this
29th day of May, 1977.

Elizabeth R. Remington
Notary Public

ELIZABETH R. REMINGTON
Notary Public, New York
County of New York
Commission Expires March 30, 1979